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Dana Brewster v. D. Steven Brewster, Gary B. Brewster, Millcreek Coffee Roasters Corp., Millcreek Coffee Airport LLC : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DANA BREWSTER, Plaintiff/Appellee	)	**APPELLANTS' REPLY BRIEF**
vs.	)	
D. STEVEN BREWSTER, GARY B. BREWSTER, MILLCREEK COFFEE ROASTERS CORP., and MILLCREEK COFFEE AIRPORT LLC Defendants/Appellants.	)	**Appellate Case No. 20090368** Trial Court No. 060917535

INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

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STATEMENT OF FACTS

1. This is not a case of D. Steven Brewster ("Steven") trying to take advantage of Dana Brewster ("Dana") in the funding of the airport venture. In fact, Steven told Dana about the airport opportunity and the need for $200,000.00 to fund the project, as early as January of 2006. (Rec. 1033, ¶s 5-10; Rec. 1073, ¶ 10). This fact is undisputed. (Rec. 1188-1190).

2. Steven did not misappropriate or withhold this opportunity from Dana, but anticipated being equal partners with her; as he told her as early as January of 2006, that each of them would need to come up with $100,000.00 to fund the airport venture as equal partners.[1] (Rec. 537, ¶s 30-31; Rec. 1033, ¶s 9-10). This fact is also undisputed. (Rec. 1188-1990).

3. Steven paid the first $100,000.00 of his own money to start the project, relying on Dana's promise that she would pay the other $100,000.00; and they would be equal partners. (Rec. 1190-1191). However, Dana never paid the other $100,000.00 as promised. (Rec. 1073, ¶ 13). This fact is also undisputed.[2] (Rec. 1191).

4. Steven paid the first $100,000.00 so the project could commence and not be lost. (Rec. 1073, ¶ 13). After this Dana had ample opportunity to pay the remaining

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[1]Funding the airport venture outside of the core business of Roasters Corporation, is a common and sound financial practice. (Rec. 1054-1056).

[2]Although Dana claims that she had access to $100,000.00 through her 401k, IRA and line of credit with her bank, it is undisputed that she never did paid this amount.

$100,000.00. Steven waited approximately eleven (11) more months, until November of 2006, for Dana to pay the remaining $100,000.00, which she never paid. (Rec. 1191).

5. As a result of Dana's refusal to pay the remaining $100,000.00, as promised, the Corporation's cash reserves (which had been accumulating over a 10 year period) were used to pay the remaining $100,000.00 in November of 2006, so the project could be completed. (Rec. 1034, ¶ 12; Rec. 1073, ¶ 13).

6. The airport venture has been profitable. Dana does not dispute this, but instead claims that she should be treated as an equal partner with Steven in the venture, although she never risked investing $100,000.00 of her own money to be an equal partner with Steven. (Rec. 541, ¶ 43; Rec. 553 ¶ 130).

7. In October of 2006, Dana, instead of investing $100,000.00 to be an equal partner with Steven, filed this derivative action against Steven and the other Defendants, claiming that Roasters Corporation could have totally financed the airport venture from within at the time; thus, making her an equal partner with Steven in the venture, although she never personally invested $100,000.00 in the venture, like Steven.[3] (Rec. 541, ¶ 43; Rec 553, ¶ 130)

8. Margaret H. Olsen, was appointed as counsel, in this action, for the Corporation and she retained a forensic accountant, Mr. Townsend, to conduct an inquiry

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[3]Because 6% of Roaster's shares were given to the three Brewster children (2% each) on January 1, 2006, Dana now claims a share of 47%, rather than 50%.

under §16-10-740(4)(a) to determine if the maintenance of the derivative action was in the best interest of the Corporation. Both Dana and Steven stipulated to use Mr. Townsend, knowing his experience as a forensic accountant, to conduct the inquiry required under §16-10-740(4)(a). (Rec. 1024, ¶ 3; Rec. 1034, ¶ 15; Rec. 1045; Rec. 1074, ¶ 16). This is undisputed by Dana. (Rec. 1191).

9. Mr. Townsend, a forensic accountant with 21 years experience analyzing closely-held corporations, including their financial information and business practices, (Rec. 1023, ¶ 2); conducted an in-depth analysis to determine whether the maintenance of the derivative action was in the best interest of the Corporation. (Rec. 1023-1068). To do this he analyzed all the books and records of the Corporation, including financial statements and documents provided by both parities, as well as, documents he specifically requested. (Rec. 1065).

10. During the course of his investigation Mr. Townsend and his staff, spent 80 hours interviewing witnesses, analyzing documents, researching information, and even preparing an actual cash flow and hypothetical repayment plan. (Rec. 1024 & 1048). He lists at least nine (9) factors he considered in reaching his conclusion that it was not in the best interest of the Corporation to proceed with the derivative action in this case. (Rec. 1054-1056, ¶s 1-9)

11. Mr. Townsend came to a definite conclusion. In his affidavit, accompanying the Corporation's Motion to Dismiss, he clearly states that the derivative

action should be dismissed in the best interests of the Corporation. (Rec. 1025-1026).

12. At the hearing on March 30, 2009, Mr. Townsend testified regarding his report, his affidavit and his conclusion. The court asked questions about the possibility of the Corporation being able to raise the money to finance the airport venture from within in 2006. (Rec. 1565, pgs. 57-58, 69-70 & 98).

13. Mr. Townsend was clear in his testimony that the Corporation would not have been able to fully fund the project from within in 2006. (Rec. 1565, pg. 57). Mr. Townsend testified that with the cash on hand and short term payables, the Corporation would not have been able to fund any more that it did. (Rec. 1565, p. 57).

14. Mr. Townsend further testified (his testimony was undisputed) that it was sound business judgment to go totally outside the corporation to fund the new airport venture in this case; and that for a closely held corporation, as in this case, going outside the corporation to finance a new project is quite common to protect the corporation from further debt and/or possible liability if the venture fails. (Rec. 1565, pg. 63).

15. At the end of the hearing, Mr. Townsend again testified that the derivative action should be dismissed in the best interest of the Corporation. Mr. Townsend's conclusion did not change after the court's inquiries at the hearing. (Rec. 1565, pg. 61).

16. At the end of the hearing, the court found no bias or bad faith on the part of Mr. Townsend. (Rec. 1565/Trans. 3/30/09 pg. 98; Rec. 1506, ¶ 1). Although it

raised the possibility of the Corporation factoring its accountants receivables in 2006 to raise all the money needed for the airport project. (Rec. 1565, pgs. 57-58, 69-70 & 98).

17. In response, Steven submitted a second declaration, stating why factoring the accounts receivables of the Corporation in 2006 to fund the airport venture, would not have been a good business decision. (Rec. 1464-1466). Mr. Townsend also submitted a second affidavit, addressing the court's questions stating that factoring the accounts receivables was not a viable option for the Corporation or a good business decision and would have threatened the existence of the Corporation. Mr. Townsend further indicated that even if the Corporation would have factored its accounts receivables, it would not have had enough money to fully fund the airport project. After considering the factoring of the accounts receivables, Mr. Townsend's conclusion remained the same, that the action should be dismissed. (Rec. 1420-1486).

18. The court in its Order denying the Corporation's Motion to Dismiss, did not deny the Motion because Mr. Townsend failed to articulate that it was in the best interest of the Corporation to dismiss the action in his initial report; or because of an uncertainty as to whether the decisions were made by a corporate officer or the board of directors; or because this was the first case wherein Mr. Townsend was asked to make such a determination. Rather, the trial court denied the Motion to Dismiss because it questioned whether the Corporation did all it could do at the time to fund the airport project. (Order, ¶ 2; Rec. 1506).

STANDARD OF REVIEW

The appeal in this case concerns the trial court's role and the scope of its review under §16-10a-740 (4)(a). Therefore, the proper standard of review concerning the trial court's application of the Statute in this case, is one of correctness. *Summit Water Distrib. Co. v. Mountain Reg'l Water Special Serv. Dist.*,108 P.3d 119 (Ut.App 2005). The issue subject to the abuse of discretion review in *Peller v. Southern Co.*, 911 F.2d 1532, 1536 (11th Cir. 1990) cited by Dana, did not involve the court's interpretation of a statute, but the trial court's finding that the companies involved failed to establish the necessary good faith. *Id.* at 1538. When statutory interpretation and novel questions of law are raised in a motion to dismiss a derivative action, a *de novo* review has been applied by the courts. *Janssen v. Best & Flanagan*, 662 N.W.2d 876 (Minn. 2003); *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000); *In re PSE & G S'holder Litig.*, 801 A.2d 295, 313 (N.J. 2002).

SUMMARY OF ARGUMENT

Dana in her brief raises a number of arguments that are irrelevant to the trial court's ruling denying the Motion to Dismiss and the appeal of the court's Order, which was entered in this case. For example, Dana complains that Townsend's conclusion is not well articulated in his initial report to Corporate counsel. However, Mr. Townsend made it clear in his affidavit, at the end of the hearing, and again in his second affidavit; that it

is not in the Corporation's best interest to proceed with the derivative action.[4] The trial court did not deny the Motion to Dismiss because Mr. Townsend failed to reach such a conclusion.

Dana also tries to raise an issue as to whether the funding decisions were made by Steven as a corporate officer or by the board of directors. However, this is not a reason, nor was it given as a reason, for the court's denial of the Motion to Dismiss. Dana also complains that the Corporation made only one inquiry into obtaining a loan to fully fund the project, again this was not the reason the Motion to Dismiss was denied, besides it is common knowledge in the financial community that such a loan to a small family business, as in this case, would require the personal guarantees of the principal owners. This was not the reason why the court denied the Motion to Dismiss.

Dana also argues that this is the first case wherein Mr. Townsend has been asked to make such a determination; although she admits that she stipulated to use Mr. Townsend knowing his past experience and background as a forensic accountant.[5] Again the trial court did not deny the Motion to Dismiss based on the lack of Mr. Townsend's experience or qualifications. Dana further argues that Mr. Townsend would not have

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[4]Mr. Townsend's response in his report, that this is a question of fact or law, but not an accounting question, deals with the existence of fiduciary duties. In response to whether to maintain the derivative action, however, Mr. Townsend goes on in more detail and lists nine factors he considered in his analysis. (Rec. 1054-1056, ¶s 1-9)

[5]Dana waived any objections to Mr. Townsend's experience and qualifications when she stipulated to use him to make the determination under §16-10a-740 (4)(a).

been comfortable making such an investment without more information. However, whether Mr. Townsend would have been comfortable is not relevant to Mr. Townsend's conclusion or the Motion to Dismiss; and this was not the reason given for the court's denial of the Motion to Dismiss, besides Steven and Dana have far more experience in the retail coffee business than Mr. Townsend, and both Steven and Dana thought it was a good opportunity. (Rec. 1565, pg. 55).

The trial court did not deny the Motion to Dismiss based on any of the above issues or arguments, and there is no finding of such on the record or in the court's Order. Furthermore, the court specifically found that there was no question, evidence or argument presented, challenging Mr. Townsend's good faith. (Order ¶ 1, Ex. "A" to Opening Brief, Rec. 1506). Therefore, there was no finding of any bad faith, lack of independence, conflict of interest, or lack of objectivity, on the part of Mr. Townsend and the Motion was not denied on this basis.

The reason for the court's denial of the Motion was because the trial court question whether the Corporation should have, and would have been able to, fund the airport project by factoring its accounts receivables. Therefore, the issue on appeal is whether the trial court properly exercised its role in denying the Motion to Dismiss, brought under §16-10a-740 (4)(a), because it had questions as to whether the Corporation did all it could to fund the project. (Order ¶ 2, Ex. "A" to Opening Brief, Rec. 1506).

The determination as to whether the Corporation is required to fund the project from within and whether it would have been a good business decision for the Corporation to factor its accounts receivables, at the time, in an attempt to fully fund the project from within; is not a determination that the trial court should attempt to make as part of its review under §16-10a-740 (4)(a).[6] This is a "business decision" best left to business professionals. In fact, according to Mr. Townsend, (and his testimony was undisputed) Steven exercised sound business judgment in attempting to go outside of the Corporation to fund the new airport venture; and that such a practice is commonly done in closely held corporations. This protects the corporation from further debt and/or possible liability if the venture fails. (Rec. 1565, p. 63). Therefore, whether the Corporation did all it could to fund the project from within in 2006, is not a reason to deny the Motion to Dismiss. Furthermore, according to Mr. Townsend factoring the accounts receivables in 2006, would not have been a viable business option at the time, but would have been a bad business decision, putting the Corporation's very existence at risk. See Townsend's Second Affidavit, addressing the court's questions.[7] (Rec. 1420-1486).

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[6]There was no evidence presented at the hearing by a business professional or any other person, that the Corporation should have, or could have, factored its accounts receivables to raise enough money to fully fund the new airport venture.

[7]This further enforces the argument that this is a business decision best made by business professionals, familiar with such financial matters, and not the courts. The Utah legislature recognized this when it passed §16-10a-740 (4)(a), providing that when such a determination has been made after a reasonable inquiry, the court *shall* dismiss the derivative proceeding. §16-10a-740 (4)(a).

Mr. Townsend was clear in his testimony that sound business judgment was used to fund the airport project and that the Corporation would not have been able to fully fund the project in 2006. (Rec. 1565, pg. 57). Mr. Townsend testified that with the cash on hand and the short term accounts payable, the Corporation would not have been able to fund more that it did. (Rec. 1565, pg. 57). Most important, the trial court did not find that any of the financial procedures or the business methods employed by Mr. Townsend in reaching his conclusion, were improper or unreasonable.

Therefore, regardless, as to whether the Corporation could have fully funded the airport project, or did all it could do to fully fund the project in 2006; Steven acted with sound business judgment in attempting to finance the venture outside the Corporation; and Mr. Townsend's conclusion, that the matter should be dismissed remains unchanged, and the Motion to Dismiss should have been granted.

Mr. Townsend determined in good faith after conducting a reasonable inquiry into the matter, that the maintenance of the derivative action in this case is not in the best interest of the Corporation. Therefore, under the "shall" requirement of §16-10a-740(4)(a), the trial court should have dismissed the derivative proceeding, rather than trying to impose its own business judgment, questioning the business judgment and conclusions reached by Mr. Townsend under §16-10a-740(4)(a).

Utah's Statute does not allow the court to examine the reasonableness of the conclusions reached, by imposing its own business judgment, as Dana asserts; but only to

determine if a reasonable inquiry has been made. If a reasonable inquiry has been made in good faith, the conclusion reached under §16-10a-740(4)(a) should not be disturbed. The court did not make any finding that the information or evidence considered by Mr. Townsend was insufficient; nor did the court find that any of the investigative procedures or methods employed by Mr. Townsend in his investigation were unreasonable.

Finally, the cases cited by Dana are not on point with the majority of cases or with Utah's Statute. Utah's Statute, unlike Florida's, does not provide that the court "may" dismiss the action, but states that the court "shall" dismiss the action. Furthermore unlike Delaware, Utah's Statute does not allow or require the court to take the additional step of applying its own independent business judgment to determine whether the action should be dismissed. If the Utah legislature wanted to provide the courts with such discretion, it would have used the word "may" instead of "shall" in the Statute; and the Statute would provide "that the court is to take the additional step of apply its own independent business judgment to determine whether or not to dismiss the action." Utah's Statute does not provide such discretion to the courts.

§16-10a-750(5)(a) is not Determinative in this Case. If the parties sought a settlement or a dismissal of the derivative action by some other means, other than a Motion to Dismiss filed pursuant to §16-10a-740(4)(a), then perhaps §16-10a-750(5)(a) would apply. This appeal is from the denial of a Motion to Dismiss filed pursuant to §16-10a-740(4)(a), which provides that the court "shall" dismiss the action; therefore, it is the

interpretation and application of the specific provisions provided in §16-10a-740(4)(a) and the use of the term "shall" that should apply in this appeal, and not the general requirement for court approval found in §16-10a-750(5)(a).

Furthermore, "court approval" is not defined in §16-10a-750(5)(a) as the court applying its own independent business judgment to decide a Motion to Dismiss brought under §16-10a-750(4)(a); and if a motion to dismiss is properly granted under §16-10a-750(4)(a), as it should have been in this case, then such a dismissal would have been with the necessary court approval.

ARGUMENT

I. THE ONLY REASON FOR THE TRIAL COURT'S DENIAL OF THE CORPORATION'S MOTION TO DISMISS IS ITS QUESTION AS TO WHETHER THE CORPORATION DID ALL IT COULD TO FUND THE AIRPORT PROJECT.

A. The trial court in its ruling did not find any bad faith, a lack of independence, or that improper investigative procedures and methodologies were used.

An appellate court's review is strictly limited to the record presented on appeal. Parties claiming error below and seeking appellate review have the duty and responsibility to support their allegations with an adequate record. *Gorostieta v. Parkinson*, 17 P.3d 1110, ¶ 16 (Utah 2000); *cf. Call v. City of W. Jordan*, 788 P.2d 1049, 1052 (Ut.App. 1990) (a party has the burden of preserving the record and providing the reviewing court with an adequate record on appeal to prove his allegations).

Although argued by Dana in her appeal brief, the trial court did not find any bad faith on the part of Mr. Townsend in denying the Motion to Dismiss. In fact, the court found that there was no question, evidence, or argument presented to challenge Mr. Townsend's good faith. (Order ¶ 1; Rec. 1506). The court also did not find that there was any a lack of independence on the part of Mr. Townsend; and did not find that the investigation and the documents reviewed by Mr. Townsend, (*i.e.*, the interviews conducted, the financial statements analyzed, the cash flow and debt plans prepared, and other documents reviewed) were insufficient or unreasonable. Furthermore, most important, the court never found that the investigative procedures and methodologies employed by Mr. Townsend were improper or unreasonable.

The trial court denied the Corporation's Motion to Dismiss because it had questions whether the Corporation did all it could to fund the project. (See Order, ¶ 2; Rec. 1506). Therefore, Dana's arguments that the inquiry was not made in good faith, that it was biased, or that it was not supported by the evidence; are not relevant to the trial court's ruling and Order denying the Motion to Dismiss based on whether the Corporation did all it could, to fund the project.[8]

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[8]Although Dana references the transcript where Mr. Townsend responded to a number of questions on these different matters. These were not reasons given by the court, and Dana has failed to provide this Court with any record, that the trial court denied the Motion to Dismiss based on any of these arguments. *Gorostieta*, *supra*, at ¶ 16.

B. The question as to whether the Corporation should have tried and would have been able to factor its accounts receivables at the time, to fully fund the project, is a business judgment for the business professional to decide and not the court.

Utah's Statute as to the dismissal of a derivative proceeding is clear. "A derivative proceeding *shall* be dismissed by the court on motion by the corporation if a person or group specified in Subsections (4)(b) or (4)(f) determines in good faith after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative proceeding is not in the best interest of the corporation." §16-10a-740 (4)(a) (emphasis added).

The trial court in denying the Motion to Dismiss in this case, stated that it had questions as to whether the Corporation did all it could to fund the airport project at the time and questioned whether the Corporation could have factored its accounts receivables to fully fund the project. The trial court apparently makes this determination, without any evidence being presented at the hearing, by any business professional, or expert with experience in this area; that factoring the accountants receivables would have been a viable option for the Corporation. There was no testimony at the hearing that factoring the accounts receivable should have been something considered as an option for the Corporation to fund the airport project. The trial court apparently made this business decision on its own without any testimony, or evidence, to support it. This determination is not a legal question for the court; but a business decision, best left to business professionals. *Auerbach v. Bennett*, 393 N.E.2d 994, 1003 (N.Y.App. 1979) ("courts are

ill-equipped to evaluate business judgments: while corporate directors, and others in the field, are much better qualified to make such decisions"); *Abromowitz v. Posner*, 513 F.Supp 120 (S.D.N.Y. 1981) ("we are precluded from substituting our uniformed opinion for that of experienced business managers of a corporation who have no personal interest in the outcome").

The fact that this determination should not be made by the court is evident from the trial court's questioning in this case about factoring the accounts receivables to raise enough money to fully fund the airport project; as factoring the accounts receivables would not have raised the money necessary, but would have been a bad business decision putting the very existence of the Corporation at risk. (Rec. 1464-1466, ¶s 4-8; Rec. 1420-1425, ¶ 8).

The question as to whether the Corporation should have tried to raise the money from within in 2006 to fully fund the airport project, and would have had the ability to do so, is not a legal question, but a matter of business practice. This is a question that should be answered by the business professional on a Motion to Dismiss brought under §16-10a-740 (4)(a), and not by the court. *Auerbach, supra*, at 1003.

C. If the court is to exercise its own business judgment in determining whether to proceed under §16-10a-740(4)(a); then what is the purpose of this Statute ?

The Defendants are not contending that the trial court should just rubber stamp the determination made under §16-10a-740(4)(a), the court should verify that the

determination was made in good faith and after a reasonable inquiry. However, this does not mean that the court is to impose its own independent business judgment, contrary to that of the business professional specified under the Statute. If this was intended, the legislature could have easily written the Statute to provide for *de novo* review by the court, or for the court to impose its own independent business judgment, in determining whether to dismiss the action. Rather, the Statute specifically provides that the court "shall" dismiss the action, after a reasonable inquiry has been made in good faith; it does not provide that the court shall substitute, or impose, its own business judgment for the person specified under the Statute, to make that determination.

Statutes are to be construed according to their plain language. *LKL Associates, Inc. v. Farley*, 94 P.3d 279, 281 (Utah 2004); *Dick Simon Trucking, Inc. v. Utah State Tax Commission*, 84 P.3d 1197 (Utah 2004). They are to be interpreted in such a manner as to give meaning to all their parts, and to avoid rendering any portions superfluous. *Labelle v. McKay Dee Hosp. Ctr.*, 89 P.3d 113 (Utah 2004).

The Statute in this case does not state that the court "may" dismiss the action after applying its own business judgment; but to the contrary, it provides that the court "shall" dismiss the action. §16-10a-740(4)(a). When examining the plain language of a statute it must be assumed that each term included was used advisedly. *Carrier v. Salt Lake County*, 104 P.3d 1208, ¶ 30 (Utah 2004). In statutory construction the word "shall" is presumed mandatory. *Rogers v. West Valley City,* 142 P.3d 554, ¶ 20 (Ut.App.

2006); *Pugh v. Draper City*, 114 P.3d 546 ¶ 13 (Utah 2005); *Landes v. Capital City Bank*, 795 P.2d 1127, 1131 (Utah 1009).

Furthermore, the Statute does not state that the court is to review the reasonableness of the decision reached and second guess the decision reached by imposing its own business judgment; rather the court is only to determine if a "reasonable inquiry" was made. The term "reasonable" is used in the Statute immediately before the word "inquiry" to define the type of "inquiry," made, *i.e.* a "reasonable inquiry." This does not allow the court to reevaluate or second guess the conclusion reached by imposing its own business judgment.

A reasonable inquiry was made in this case. A reasonable inquiry is not made when the investigation is so restrictive in scope or so shallow in execution, or otherwise so pro forma or halfhearted, that it constitutes a pretext or sham that would raise questions of good faith. 19 Am Jur 2d Corporations § 1975; *In re PSE & G Shareholder Litigation*, 801 A.2d 295 (N.J. 2002); *In re United Health Group Inc., Shareholder*, 591 F.Supp.2d 1023, 1029 (D.Minn. 2008); *Auerbach v. Bennett*, 393 N.E. 2d 994; 47 N.Y.2d 634-35.

The cases cited by Dana in her brief do not interpret Utah's Statute, at issue in this case, are not in line with the plain language of §16-10a-740(4)(a), which provides

that the court *shall* dismiss the derivative action after a reasonable inquiry has been made. (emphasis added) The Florida Statute, cited by Dana and interpreted in *Batur v. Signature Properties of Northwest Florida, Inc.*, 903 So.2d 985 (Fla.Ct.App. 2005), is clearly inapposite to Utah's, as it provides that the court *"may"* dismiss a derivative proceeding. Fla. Stat. § 607.07401. Furthermore, even the Florida Court of Appeals held that the proceeding may be dismissed if there is no bias, conflict of interest, objectivity, and a reasonable investigation has been made. *Batur v. Signature Properties of Northwest Florida, Inc.*, 903 So.2d 985, 995 (Fla.Ct.App. 2005). There was no question of bias, conflict of interest, objectivity, or of the procedures or methods used in this case.

In the other case cited by Dana, *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), the motion to dismiss was not brought under a specific statute, such as Utah's Statute, but was treated as a hybrid summary judgment motion, a motion to dismiss under Rule 12(b), and a voluntary dismissal under Rule 41(a)(2). *Id.* at ¶s 46-48. The court under such circumstances applied a Rule 56 standard and was allowed to apply its own business judgment to decide the motion.

Utah's statute does not provide the courts with such discretion and it is consistent with the majority of jurisdictions which provide that if an independent committee conducts a reasonable inquiry in good faith, the substantive aspects of the

committee's decision are not subject to judicial inquiry. *See Davidowitz v. Edelman*, 583 N.Y.S.2d 340 (1992) (the court may not inquiry into the merits of the special committee's determination, as the courts are ill equipped and infrequently called on to evaluate what are and must be essentially business decisions); *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979) (while court may inquire as to qualifications and procedures of an independent litigation committee, good faith exercise of their business judgement is immune from attack by the courts); *cf. Greenfield v. Hamilton Oil Corp.*, 760 P.2d 664 (Colo.App. 1988); *Houle v. Low*, 556 N.E.2d 51 (Mass. 1990); *Hasan v. CleveTrust Realty Investors*, 548 F. Supp 1146 (N.D. Ohio 1982).

See also Parkoff v. General Telephone & Electronics Corp., 425 N.Y.S.2d 762 (business judgment rule bars judicial inquiry into determination by special litigation committee unless there is evidence of bad faith or fraud); *In re General Tire & Rubber Co. Securities Litigation*, 726 F.2d 1075 (6th Cir. 1984) (Ohio law precludes unnecessary judicial interference with decision of committee to forgo litigation of derivative claims); and *Drilling v. Berman*, 589 N.W.2d 503 (Minn.App. 1999) (judicial review of a committee's recommendation is limited to determining whether the committee is independent and conducted its investigation in good faith).

There is no question but that Mr. Townsend, stipulated to by the parties, is independent and that he conducted his inquiry in good faith. The court did not find his investigative procedures, or the methods he employed, to be improper or unreasonable; but rather questioned the conclusions that he reached. Mr. Townsend's conclusion, not to proceed with the derivative action, is a business decision he reached in good faith, based on a number of factors he considered, using his best business judgment. His conclusion, reached in good faith and after a reasonable inquiry, should be followed and the matter should be dismissed, under §16-10a-740(4)(a).

II. WHETHER THE CORPORATION COULD HAVE FULLY FUNDED THE AIRPORT VENTURE IN 2006, IS NOT GROUNDS FOR DENYING THE MOTION TO DISMISS.

Mr. Townsend was clear in his testimony that the Corporation would not have been able to fully fund the airport project in 2006. (Rec. 1565, pg. 57). Mr. Townsend testified that with the cash on hand and the short term accounts payable, the Corporation would not have been able to fund more that it did. (Rec. 1565, pg. 57). The court, while questioning his conclusion, did not state or find any problem with the investigative procedures or the methods employed by Townsend to reach his conclusion. The court did not find that his investigative procedures or methods were unreasonable.

However perhaps more important, regardless of the Corporation's ability to factor the accounts receivables to fully fund the airport project in 2006, Mr. Townsend testified (and his testimony was undisputed) that Steven used sound business judgment in his attempt to go outside the corporation to fund such a new venture; and that for closely held corporations, such as in this case, going outside the corporation to fund a new venture is quite common, because doing so protects the corporation from further debt and/or future liability if the venture fails.[9] (Rec. 1565, pg. 63)

Therefore, regardless, as to whether the Corporation could have fully funded the project in 2006, or did all it could to fully fund the project in 2006; Steven acted with sound business judgment in attempting to fund the airport venture outside the Corporation; and therefore, Mr. Townsend's conclusion remained the same. The trial court should have deferred to Mr. Townsend's recommendation under §16-10a-740(4)(a) and should have granted the Motion to Dismiss, regardless of the Corporation's ability to fully fund the airport project in 2006.

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[9]Dana actually incurred a benefit from this as a shareholder of Roasters, as the Corporation did not incur any debt to service, allowing higher profits and dividends.

III. SINCE A MOTION TO DISMISS WAS FILED PURSUANT TO § 16-10a-740(4)(a) AND DENIED; IT IS THIS SECTION OF THE STATUTE THAT SHOULD BE APPLIED IN THIS COURT'S REVIEW, AND NOT § 16-10a-750(5)(a).

If the matter was being discontinued or settled by the parties, then §16-10a-740(5)(a) may require court approval. However, in this case a Motion to Dismiss was filed by the Corporation pursuant to §16-10a-740(4)(a), which provides that the court "shall" dismiss the proceeding. It is the denial of this Motion that is being appealed in this action; therefore, it is §16-10a-740(4)(a) that should be applied in this Court's review of the trial court's denial and not §16-10a-740(5)(a). As stated above, if court approval was required to dismiss a proceeding under §16-10a-740(4)(a), the legislature would not have used the word "shall" in the Statute, but would have used the word "may" and would have said "upon the court's approval."

Furthermore, "court approval" is not defined in §16-10a-750(5)(a) as the court applying its own independent business judgment to decide a Motion to Dismiss brought under §16-10a-750(4)(a); and if a motion to dismiss is properly granted under §16-10a-750(4)(a), as it should have been in this case, then such a dismissal would have been with the necessary court approval.

CONCLUSION

Mr. Townsend after an extensive investigation and in-depth analysis of the relevant financial statements, and other documents provided, found that Steven acted under sound business principles, and within the business judgment rule, in structuring the airport opportunity and financing the project, outside of the Corporation. Mr. Townsend concluded in his report, citing nine (9) specific factors that it was not in the best interest of the Corporation to proceed with the derivative claims.

Based on his conclusion the Corporation filed a Motion to Dismiss the Derivative Claims, pursuant to § 16-10a-740(4)(a), which provides that the court "shall" dismiss the derivative claims on motion by the corporation after a good faith and reasonable inquiry has been made.

The trial court denied the Motion to Dismiss because it questioned whether the Corporation did all it could to fully fund the airport project in 2006. The court did not find any bad faith, insufficient evidence, or that the investigative procedures and methods employed by Mr. Townsend in his investigation, were unreasonable or improper. Rather, the court questioned the conclusions reached by Mr. Townsend and whether factoring the accounts receivables was a viable business option for the Corporation to fully fund the project in 2006. However, such a question is a business decision that should be left to the

business professional to determine in good faith and after a reasonable inquiry; and not for the court to independently determined in its review under §16-10a-740(4)(a)

If the court is to independently make such business decisions in ruling on a Motion to Dismiss under §16-10a-740(4)(a); then what is the purpose of the Statute ? and why does the Statute direct that the court "shall" dismiss the action ? The purpose of the Statute is to allow the business professional to make the business decisions and reach a conclusion whether to proceed or not; the court, is to make sure that there is no bias or bad faith and that a reasonable inquiry has been made. The court is not to second guess the substance of the conclusions or impose its own independent business judgment in trying to decide such business matters.

The conclusion in this case was reached by Mr. Townsend in good faith and after a reasonable inquiry was made. The trial court overstepped its bounds in denying the Motion to Dismiss by imposing its own business judgment on Mr. Townsend's conclusions.

Therefore, the Order denying the Motion to Dismiss entered in this case, should be reversed and the derivative proceeding should be dismissed.

DATED this 14 day of December, 2009.

BOND & CALL, L.C.

F. Kevin Bond,
Budge W. Call,
Attorneys for Brewster Defendants

MAILING CERTIFICATE

I hereby certify that on the 14 day of December 2009, I did mail, U.S. First Class, postage pre-paid, 2 true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF,** to the following:

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